United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-5008

To be argued by

SHELDON ENGELHARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,

Appellant,

v.

REA EXPRESS, INC., DEBTOR
REA EXPRESS, INC., DEBTOR-IN-POSSESSION,

Appellee.

On Appeal From The United States District Court
For The Southern District of New York

APPELLANT'S BRIEF

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INTERNATIONAL ASSOCIATION OF MACHINISTS
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STATEMENT OF ISSUES PRESENTED

The questions presented are: (1) whether the Court below erred in permitting a Debtor-In-Possession, subject to Chapter XI of the Bankruptcy Act, to reject an executory collective bargaining agreement pursuant to 11 U.S.C. § 713(1), where the parties thereto are subject to the Railway Labor Act, 45 U.S.C. § 151, et seq.; and (2) whether in any event the Debtor-In-Possession established that its collective bargaining agreement with the International Association of Machinists is onerous and burdensome, and therefore may be rejected pursuant to 11 U.S.C. § 713(1).

STATEMENT OF CASE

The Appellee Debtor-In-Possession, REA Express, Inc. (hereafter "REA") moved in the Bankruptcy Court pursuant to Section 313(1) of the Bankruptcy Act (11 U.S.C. § 713(1)), to reject its collective bargaining agreements with Appellants, International Association of Machinists and Aerospace Workers, AFL-CIO (hereafter "IAM") and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO (hereafter "BRAC").

In an opinion filed May 2, 1975, Hon. John J. Galgay, Bankruptcy Judge, denied REA's application to reject its collective bargaining agreements with the IAM and BRAC.

REA, pursuant to 11 U.S.C. § 67(c) and Rule 801 of the Bankruptcy Rules, appealed Judge Galgay's decision to the United States District Court for the Southern District of New York. In a decision dated May 22, 1975, Hon. Inzer B. Wyatt, United States District Court Judge, reversing Judge Galgay, held that the IAM and BRAC collective bargaining agreements were executory agreements within the meaning of Section 313(1) and granted REA permission to reject both of those agreements.

On motion to stay the decision of Judge Wyatt, this Court, on May 27, 1975, denied such motion but granted the application for an expedited appeal.

FACTS

REA is a carrier subject to the Railway Labor Act, 45 U.S.C. § 151, et seq.(hereafter "RLA"). The IAM is a party to a collective bargaining agreement with REA covering persons employed in certain classifications and crafts engaged in the repair and maintenance of vehicles owned or operated by REA (Debtor's Exhibit "9(a)", Rule 1); the agreement by its terms expires on June 1, 1976. REA and IAM have been in a collective bargaining relationship for many decades; they have negotiated successive collective bargaining agreements pursuant to the provisions of the RLA.

REA filed a petition under the provisions of Chapter XI of the Bankruptcy Act on or about February 18, 1975, and thereafter sought to reject its collective bargaining agreement with IAM as being an executory agreement which was onerous and burdensome. On the same ground, REA sought to disaffirm the existing collective bargaining agreement it has with BRAC.

In a separate application BRAC sought an order of the Bankruptcy Judge to enforce the terms and conditions of its collective bargaining agreement with REA. No such application has been filed by the IAM.

In accordance with the most recent agreement, a "Memorandum Agreement" dated October 31, 1973, REA and IAM established an "Area Wage Comparability Panel" to adjust wages of REA employees to parity with those of truckline employees who perform similar work in the various geographic areas where REA's employees are employed. (Debtor's Exhibit "9(b)" p. 9).** Pursuant to the provisions of the Memorandum Agreement, the Area Wage Comparability Panel agreed to provide wage increases to all covered employees, in several steps, during the term of the collective bargaining agreement. (p. 104*; p. 18**). At the time of the hearings before Judge Galgay, full implementation of the wage increases agreed upon by the Panel had not been achieved. (p. 104*; p. 18**) Consequently, REA employees in the collective bargaining unit are presently paid a lower wage rate than the wage rate paid to employees in the trucking industry performing the same duties (pp. 71-72**). This would be true even if REA employees were being paid 100% of their contractual wage rate instead of 90%; subsequent to the filing of the petition under Chapter XI, REA unilaterally reduced the wages of employees covered under the IAM agreement by 10%.

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* Refers to transcript of April 1, 1975 hearing before Judge Galgay.

** Refers to transcript of April 3, 1975 hearing before Judge Galgay.

At no time since the effective date of the existing collective bargaining agreement (and certainly not since the filing of the Petition) has REA served notice on the IAM of a proposed change in the agreement relating to rates of pay, rules or working conditions, as required by the RLA (45 U.S.C. § 156). (p. 69**)

However, prior to the filing of the Petition, REA developed alternate plans for the consolidation of its operation in order to improve its financial condition: Plan "A" and Plan "B-2". REA prefers utilizing Plan "B-2".

REA has interpreted its collective bargaining agreement with IAM to permit implementation of their proposed "B-2" Plan (pp. 101, 103*) Prior to the filing of the Petition herein, IAM members were laid off in accordance with the terms of that plan (p. 101*)

In moving to reject the IAM collective bargaining agreement, REA has consistently referred to IAM and the BRAC agreements as virtually identical, in trying to prove that the IAM agreement is onerous and burdensome. In particular, REA claims it cannot lay off employees without becoming liable for supplementary unemployment insurance benefits. Additionally, REA asserts that moving expenses are provided to employees if they "follow the work" pursuant to

their seniority rights. Again, although IAM employees may follow their work, the IAM agreement does not provide for moving expenses.

Thus, assuming that the Court below or the Bankruptcy Court had the authority to reject the agreements with IAM and BRAC, it appears that neither the decision of Judge Galgay, nor the decision of Judge Wyatt, sufficiently differentiated those agreements from each other to determine whether either or both are "onerous and burdensome" as alleged by REA.

POINT I

THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE DEBTOR-IN-POSSESSION AND THE IAM IS NOT SUBJECT TO BEING REJECTED UNDER THE PROVISIONS OF SECTION 313(1) OF THE BANKRUPTCY ACT.

The collective bargaining agreement between REA and IAM is not subject to being rejected under Section 313(1) of the Bankruptcy Act.

A. Railway Labor Act. Although the REA-IAM agreement is executory as to its unexpired term, the "wages, rules and working conditions" provided can only be changed by mutual agreement of the parties or in accordance with the provisions of Section 156 of the RLA (45 U.S.C. § 156).

It has been held that a debtor under Chapter XI of the Bankruptcy Act shall exercise all of the powers of a trustee. 11 U.S.C. § 742; American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A., Tramp Tankers Corporation of Liberia, 280 F.2d 119 (2nd Cir., 1960). It should be emphasized that included in the definition of "carrier under the provisions of the RLA are ". . . any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier'. . . ." (45 U.S.C. § 151) (emphasis supplied).

The RLA further provides:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." (45 U.S.C. § 152, Seventh)

The maintenance of the status quo provision is consistent with the stated purposes of the Act (45 U.S.C. § 151a):

> "(1) To avoid any interruption to commerce . . . ; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; . . ."

The status quo provisions of the RLA were analyzed by the Supreme Court in Detroit and Toledo Shore Line Railroad Company v. United Transportation Union, 396 U.S. 142 (1969), which said: (at 148)

> "The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce. The problem of strikes was considered to be particularly acute in the area of 'major disputes,' those disputes involving the formation of collective agreements and efforts to change them. Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711, 722-726 (1945). Rather than rely upon compulsory arbitration, to which both sides were bitterly opposed, the railroad and union representatives who drafted the Act chose to leave the settlement of major

disputes entirely to the processes of noncompulsory adjustment, Id., at 724. To this end, the Act established rather elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation. General Committee, B. L. E. v. Missouri-K.-T. R. Co., 320 U.S. 323, 328-333. It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted. Railroad Trainmen v. Terminal Co., 394 U.S. 369, 378 (1969); Elgin, J. & E. R. Co. v. Burley, supra, at 721-731; Texas & N. O. R. Co. v. Ry Clerks, 281 U.S. 548, 565-566 (1930). . final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process. As we noted in Railway Clerks v. Florida E. C. R. Co., 384 U.S. 238, 246, 62 LRRM 2177 (1966), 'the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolved the dispute.'

The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the

> interests of the other side and thus reach agreement without interruption to commerce." (emphasis supplied)

The importance of the maintenance of the status quo required by § 152 Seventh is made manifest by the inclusion of criminal penalties for a breach thereof in § 152 Tenth.

As stated above, REA has not in any respect complied with the clear mandate of the RLA, either as to "changes" it wishes to make or as to the maintenance of the "status quo".

The Bankruptcy Act (Section 313(1) does not exempt REA from the requirement of the RLA. Indeed, this very question was presented in Matter of Overseas National Airways, Inc., 238 F. Supp. 359 (E.D.N.Y., 1965), where the Court held in part:

> "The collective bargaining agreements in question, governed, as I believe they are, by the provisions of the Railway Labor Act, can be changed only in conformity with that Act." (at 360)

As is true in these proceedings, the Overseas case was not a case involving railroads; rather it dealt with airline employees. The Court, holding that Section 313 of the Bankruptcy Act did not apply to employees covered by the RLA, cited Section 77(n) of the Bankruptcy Act as precluding the changing of "wages or working conditions of such employees."

In determining whether or not Section 313(l) of the Bankruptcy Act, subordinates the procedures set forth in the RLA, absent any legislative directive requiring such subordination, the discussion of statutory construction by the Supreme Court in Blanchette v. Connecticut General Insurance Corporations, 419 U. S. 102, provides guidelines which should be applied here. The Court said:

> "One canon of construction is that repeals by implication are disfavored. . . . . Rather, since the Tucker Act and the Rail Act are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Moreover, the Rail Act is the later of the two statutes and we agree with the Special Court that
>
> > 'A new statute will not be read as wholly or ever partially amending a prior one unless there exists a "positive repugnancy" between the provisions of the new and those of the old that cannot be reconciled. . . . This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end. . . .' 384 F.Supp., at 946 " (citations omitted)
>
> (at 133)

The RLA's legislative scheme designed to protect and insure the flow of commerce by requiring elaborate procedures before changes in provisions of collective bargaining agreements subject thereto can be made, as well as requiring delay before resort to self-help, must not be made subordinate to Section 313(1) of the Bankruptcy Act. A contrary conclusion would be judicial amendment of the RLA since (1) the employees and their representatives would either be free to resort to self-help during negotiations, precisely contrary to the purposes of the RLA, or (2) employees and their representatives would be denied their fundamental right to engage in such activity without the benefits of the statutory alternatives. Certainly, no such result can be imputed to Congress in permitting rejection of executory agreements under Section 313(1). For the reasons stated below collective bargaining agreements were not the class of "agreements" contemplated under that Section.

B. Labor Management Relations Act. The District Court for the Southern District of New York has recognized the distinction between collective bargaining agreements and other types of contracts in applying the Bankruptcy Act. In Shopmen's

Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO v. Kevin Steel Products, Inc., 381 F. Supp. 336 (S.D.N.Y. 1974), which is now on appeal in this Court, Judge Knapp held that collective bargaining agreements were not subject to being disaffirmed under the provisions of the Bankruptcy Act. In Kevin, unfair labor practice charges were filed against the company for refusal to execute a collective bargaining agreement which had been agreed to in substance. Prior to an NLRB Administrative Law Judge's decision, the company filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. The Administrative Law Judge ruled that the company had committed unfair labor practices and that it was required to execute the collective bargaining agreement, which was to be given retroactive effect. The company did not comply with the order and petitioned the Bankruptcy Judge to reject the collective bargaining agreement it has been ordered to execute and honor. The petition was granted. Subsequently, the NLRB affirmed the Administrative Law Judge's Order.

In reversing the order of the Bankruptcy Judge, the District Court, after considering the distinctions between

the LMRA and the RLA, stated:

> "In the last analysis it seems more logical to assume that the Congress intended to distinguish collective bargaining agreements as a class from all other contracts than that it is intended to make seemingly irrelevant distinctions between different kinds of labor agreements." (at 338)

POINT II

A COLLECTIVE BARGAINING AGREEMENT IS NOT AN EXECUTORY CONTRACT OF THE TYPE WHICH CAN BE REJECTED UNDER THE BANKRUPTCY ACT.

In the opinion of the Court below, Judge Wyatt stated (at 2):

> "There is nothing cited in legislative history to indicate that collective bargaining agreements cannot be rejected under §313 (1). 8 Collier on Bankruptcy (14th ed.) 199 states: 'There is no restriction on the type of executory contract that may be rejected.'"

While the Bankruptcy Act does not make reference to collective bargaining agreements, such omission is not surprising. When §313 (1) of the Bankruptcy Act was passed in 1938, there did not exist the body of law which has now delineated the differences between collective bargaining agreements and ordinary commercial contracts. These differences are great and controlling.

Not long after §313 (1) was enacted, the collective bargaining agreement was described as a form of trade agreement or tariff. In J. I. Case Co. v. NLRB, 321 U.S. 332 (1944), the Supreme Court stated:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms

> which will goverr hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility shcedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit."
>
> (at 334)

W. Willard Wirtz referred to the collective bargaining agreement as more than an orthodox contract, and likened it to"law by agreement":

> "Our first and probably most basic difficulty has been in appreciating the differences between collective bargaining agreements and ordinary commercial contracts. The fact that they are called 'contracts' has led us to try to fit them into the familiar molds of Willistonian concepts. The result, in England and Canada, has been that the Courts, finding more duress than consideration in the origin of these 'agreements,' have refused to enforce them. Our own Courts have fortunately taken a more flexible approach. After several decades

> of vain attempt to fit these square pegs into the familiar round holes of the 'usage' and 'agency' and 'third party beneficiary' theories, the American Courts have concluded that these are not ordinary contracts at all, being rather in the nature of 'treaties' or 'tariff schedules'. This makes them, of course, no less enforceable than if they were orthodox 'contracts'. The nature of these 'laws by agreement' is still more exactly reflected in the language of the agreements themselves, wherein the parties refer to them as representing an exercise of the 'legislative function'."
>
> (Wirtz, "Collective Bargaining: Lawyers' Role in Negotiations and Arbitrations", 34 A.B.A.J. 547 at 548 (1948)).

The special nature of the collective bargaining agreement was recognized as federal policy in Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957). There the union commenced an action in federal court under §301 of the Labor Management Relations Act (29 U.S.C. §185) to compel the employer to arbitrate a dispute in accordance with the parties' collective bargaining agreement.

The Supreme Court held that an agreement to arbitrate is the quid pro quo for an agreement not to strike and that §301 "expressed federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained that way." (at 455).

The Court specifically stated that "the substantive law to apply in suits under §301 (a) is federal law, which the courts must fashion from the policy of our national labor laws". (at 456). This must be contrasted with the ordinary commercial contract under which rights and obligations are determined by state law.

In United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960), the Supreme Court again noted that the collective bargaining agreement does not embody the ordinary contractual relationship:

> "A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces."
>
> (at 580)

What is most significant about the nature of the collective bargaining agreement is its preeminence in the statutory scheme of labor relations. Under the Railway Labor Act (45 U.S.C. §151 et seq.), which governs the labor rela-

tions of REA and the IAM, the paramount duty of carriers and labor organizations representing employees is as follows (45 U.S.C. §152, First):

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The Railway Labor Act specifies particular procedures which must be followed in order to terminate or modify collective bargaining agreements (45 U.S.C. §156):

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working condtions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed

> after termination of conferences without request for or proffer of the services of the Mediation Board."

No ordinary commercial contract is subject to such a statutory scheme.

The difference between the ordinary executory commercial contract and the collective bargaining agreement is further made manifest in the difference of the relationships of the contracting parties. Generally when an onerous and burdensome executory contract is disaffirmed the relationship between the parties is also ended. That is not the case of parties covered by a collective bargaining agreement since the employer-labor union relationship is a continuing one mandated by law (LMRA and the RLA) and the provisions of such an agreement include many diverse provisions, economic and otherwise, e.g., wages, hours, rules, grievance procedures, seniority rights, leaves of absence, etc.

Additionally, Section 313(1) of the Bankruptcy Act contemplates that upon the disaffirmance of an executory contract, the party who suffers thereby is allowed to file a claim in the proceeding for its provable damage. Yet the value of many of the rights of employees under a collective

bargaining agreement, such as pension, welfare and seniority rights, could not be realistically calculated were it to be disaffirmed.

It is thus clear that the collective bargaining agreement is, by its very nature and by congressional imprimatur, different from the type of commercial executory contract which the Bankruptcy Act permits to be rejected.

POINT III

REA HAS FAILED TO ESTABLISH THAT ITS COLLECTIVE BARGAINING AGREEMENT WITH THE IAM IS "ONEROUS AND BURDENSOME".

Assuming, arguendo only, that the IAM collective bargaining agreement is subject to being rejected under Section 313 (1), REA has failed to establish that its collective bargaining agreement with it is "onerous and burdensome", Matter of Overseas National Airways, Inc., supra.

As set forth above, two of the most significant points referred to by REA in its attempt to establish that the IAM agreement is "onerous and burdensome" are simply not part of the IAM-REA agreement, i.e. supplemental unemployment benefits and moving expenses.

Unless it is determined that any obligation of a debtor is "onerous and burdensome" per se, the Court must consider all factors, including the consequences that may result to the IAM and the employees. As the Court said in Matter of Overseas National Airways, Inc., supra, (at 361):

> "It seems to me, however, that the Bankruptcy Court, when it has the power to reject a collective bargaining agreement, should do so only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from its obligations under a collective bargaining agreement, it may be depriving the employees affected of

> their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors."

Consideration of the terms of the IAM-REA collective bargaining agreement, and a "careful balancing of the equities" will necessarily require a finding that that agreement is not "onerous and burdensome".

CONCLUSION

For all of the foregoing reasons, this Court is respectfully urged to reverse the decision of District Judge Inzer B. Wyatt, dated May 22, 1975 and affirm the decision of Bankruptcy Judge John J. Galgay, dated May 2, 1975.

Respectfully submitted,

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State of New York)
County of New York) ss.:

IRENE SLOSSER, being duly sworn, deposes and says that deponent is over 18 years of age and is not a party to the within action; and resides in New York, N.Y.

That on June 6, 1975, deponent served two copies of the within Brief of the Appellant International Association of Machinists and Aerospace Workers, AFL-CIO, upon the attorneys listed below, by depositing two true copies of same enclosed in a postpaid wrapper, properly addressed, in an official depositary under the exclusive care and custody of the United States Post Office Department within New York State:

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Sworn to before me this
6th day of June, 1975

Robert L. Jauvtis

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